UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/799
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 799

Case No. 886: OUDEH

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry, Vice-President; Mr. Francis Spain;

Whereas, on 25 October 1995, Muti' Mohammed Oudeh, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting the Tribunal to order:

"a. Payment of the Applicant's separation benefits in US dollars at the UN operational rate of exchange as available on 31 May 1992, of US$ 1 = LS 11.20.

b. Payment of legal counselling and secretarial expenses and fees estimated at US$ 400.-."

Whereas the Respondent filed his answer on 25 April 1996;

Whereas the Applicant filed written observations on 5 September 1996;

Whereas the facts in the case are as follows:

The Applicant, an UNRWA area staff member, entered service on 31 October 1972, on a fixed-term appointment as a Teacher in the Syrian Arab Republic (SAR). With effect from 1 September 1973, he was granted a temporary indefinite appointment, at the grade 4, step VII level.

On 1 January 1992, the Respondent's book exchange rate for US dollars in the SAR changed from 11.20 Syrian pounds to the US dollar, to 26.60 Syrian pounds to the US dollar. On 5 January 1992, the Director of UNRWA Affairs, SAR, issued Field Staff Circular No. 17/92. This Circular stated that the Commissioner-General had agreed that qualifying staff members who opted for early voluntary retirement during the period 1 January 1992 to 29 February 1992 would, exceptionally, receive their retirement benefits using the UN Operational Exchange Rate of 11.20. The Circular went on to state that these exceptional rules were valid only until 29 February 1992. Thereafter, the new UNRWA Book Exchange Rate of 26.60 would apply.

On 15 January 1992, the Medical Officer of the Damascus Training Centre requested that the Applicant be referred to a medical board to determine whether he was fit for service with the Agency (the "First Medical Board"). On 29 April 1992, the First Medical Board concluded that he was fit for service. In a letter dated 16 May 1992, the Field Personnel Officer, SAR, notified the Applicant of this finding. On 21 April 1993, the Applicant wrote to the Principal of the Damascus Training Centre and again requested a referral to a medical board because he suffered from chronic laryngitis and was having difficulty speaking.

On 30 September 1993, the Applicant was referred to a second medical board (the "Second Medical Board"), which concluded, on 13 January 1994, that the Applicant was unfit for further service with the Agency as an instructor but could fulfil administrative duties.

On 21 February 1994, the Field Personnel Officer, SAR, wrote to the Applicant to advise him that, in the light of the Second Medical Board's conclusion, the Agency had decided to terminate his services on medical grounds with effect from 27 October 1994, given that no suitable alternate posts were available.

In June 1994, the Applicant wrote to the Field Administration Officer, SAR, requesting payment of his termination benefits in US dollars at the exchange rate of 11.20 Syrian pounds to the US dollar. This request was denied by a memorandum dated 1 September 1994, from the Chief, Personnel Services Division. He informed the Applicant that his termination benefits would be paid at the rate applicable at his separation date. On 16 October 1994, the Applicant reiterated his request to the Commissioner-General.

On 16 October 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB), which adopted its report on 29 May 1995. Its evaluation, judgement and recommendation read, in part, as follows:

> IV. Evaluation and judgement
>
> 17. In its deliberations, the Board dwelt on the preliminary issue of the receivability of the case and found that the Appellant submitted a letter on 16 October 1994 to the Field Office Director explaining his case to him and requesting that his separation benefits be calculated at the exchange rate of SYP 11.20 to the dollar. This letter was submitted in Arabic and was found by the Board in the Appellant's personal file. It was also submitted simultaneously with the letter of appeal addressed to the Board Secretary.
>
> The Board noted that the Appellant never received a response to the said letter.
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> The Board, therefore, resolved that the Appellant fulfilled the requirement of paragraph 2 of Area staff rule 111.3.
>
> The Board then considered the merits of this case and [found] the following:

A. The Appellant has been suffering from chronic laryngitis since January 1990, a disease which is adversely affected by the use of his voice as an instructor.

This is evident in the medical report dated 5 April 1995 given to the Appellant by Dr. [X], a medical specialist.

B. The Appellant has been requesting to be referred to a medical board since 1991.

C. The Board noted that the reason for which the Appellant was referred to a medical board on both occasions, i.e. in 1992 and in 1993, was that he suffered from chronic laryngitis, an illness that is adversely affected by the use of one's voice as was the case with the Appellant in his work as an instructor.

The First Medical Board held on 29 April 1992 concluded that the Appellant was fit for further service with the Agency while the Second [Medical] Board that was held on 13 January 1994 concluded that the Appellant was unfit for service as an instructor.

D. The Board noted that the conclusions of both medical boards were based on the same health condition which the Appellant suffered; the First Medical Board held in April 1992 found the Appellant fit, while the Second Medical Board held in January 1994 found the Appellant unfit for further service as an instructor.

In this context, and while the Board acknowledges that it cannot substitute its opinion on medical matters for that of a medical board, the Board is of the opinion that the finding of unfitness in January 1994 necessarily means that the Appellant must have been unfit in April 1992.

E. The Board also took note of Field Staff Circular 17/92 of 5 January 1992, according to which staff members who left the Agency's service on early retirement between 1 January and 29 February 1992, received their separation benefits calculated at the exchange rate of SYP 11.20 to 1 US dollar.

In this context, the Board resolved that, had the Appellant been declared unfit for service in 1992, the said Staff Circular should have been applied in his case in calculating his separation benefits.

Recommendation

18. In view of the foregoing, the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed with a view to calculating the Appellant's separation benefits at the exchange rate of SYP 11.20 to the US dollar.

On 14 August 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB's report and informed him as follows:

> "... You will note that the Joint Appeals Board concluded that you were unfit for service in 1992; it has recommended that the administrative decision to the contrary be reviewed and that your separation benefits be calculated at the exchange rate in effect in 1992.
>
> I have carefully reviewed the Board's report but do not agree with its conclusions and recommendations. You suffered from a progressive chronic laryngitis condition which worsened over time. The finding of the First Medical Board, that you were fit for continued service as a teacher, is consistent with the findings of the Second Medical Board and is supported by the evidence. In my view the Joint Appeals Board has improperly substituted its judgement for that of a medical board. Therefore, your appeal is dismissed.
>
> ..."

On 25 October 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision not to accept the recommendation of the JAB to calculate his separation benefits at the rate of 11.20 Syrian pounds to the US dollar is flawed by mistake of facts and error of law.

2. The Applicant's termination indemnity should have been calculated at the rate available at the time of his first medical examination.

Whereas the Respondent's principal contention is:

The Applicant's termination benefits were properly paid in US dollars calculated at the rate of exchange prevailing at the time of his termination and not at any other, more advantageous, rate of exchange.

The Tribunal, having deliberated from 5 November to 21 November 1996, now pronounces the following judgement:

I. The Applicant requests the Tribunal to order that his separation benefits be paid at the United Nations Operational Rate of Exchange in effect on 29 February 1992, i.e., at a rate of 11.20 Syrian pounds to the US dollar, as opposed to the new UNRWA Book Exchange Rate of 26.60 Syrian pounds to the US dollar, which applied after 29 February 1992 and to which the Applicant was subject by virtue of the fact that he separated from service in 1994. The Joint Appeals Board (JAB) found that, as on 29 April 1992, the Applicant was unfit for service, his separation benefits should be calculated at the exchange rate in effect prior to 29 February 1992. The Commissioner-General did not accept the JAB's finding since he believed that the JAB had improperly substituted its judgement for that of a medical board.

II. The Applicant, who was an instructor in the Syrian Arab Republic, says that he had specialist advice, from 1990, that he should not continue as an instructor because of a medical condition affecting his voice. He applied, in 1991, for assessment by a medical board to decide whether he was fit to continue as an instructor. The Medical Board met on 29 April 1992 and found that the Applicant was fit for service. The Applicant continued to press for a new examination. A new medical board, in January 1994, found that he was unfit for service. The Applicant takes issue with the

finding of the First Medical Board and contends that it erred in ignoring a specialist's recommendation and that it should have sought other expertise before rejecting this specialist's recommendation. He also complains that the members of the First Medical Board were not specialists in the relevant branch of medicine.

III. The Applicant's arguments concerning the alleged deficiencies of the First Medical Board were not made at the time of its finding. Although not satisfied with the decision of this medical board, the Applicant chose to wait until after the Second Medical Board had made its findings to raise a complaint. The Tribunal is not satisfied that circumstances exist which would enable it to embark on consideration of this issue. Indeed, there is an inherent contradiction in the Applicant's argument: he criticizes the First Medical Board and its findings, while accepting the Second and its findings, although the Second Medical Board conducted its enquiry in the same manner as the First. The only difference between the First Medical Board and the Second was that the Second had a partially different composition.

IV. The JAB expressed the view that the finding of unfitness by the Second Medical Board necessarily meant that the Applicant was unfit at the time of the First Medical Board's examination. In coming to this conclusion, the JAB would appear to assert that the Applicant's condition had not deteriorated in the intervening period. However, the Applicant himself refers to his voice progressively diminishing, and vanishing, over the three years before he was declared unfit.

V. However, the fundamental point is that neither the JAB nor this Tribunal can or should substitute its judgement for that of a medical board. Therefore, given the finding that the Applicant was fit at the time of the First Medical Board's examination, there is

no basis for the claim that his termination indemnity should have been calculated at the rate in effect at the time of the First Medical Board's finding. The Applicant's claim that his separation benefits should be paid in US dollars at the UN operational rate of exchange as of 31 May 1992, would appear to be a claim for such payment, irrespective of whether his separation had occurred following the First Medical Board's examination or on the date in 1994, on which he was actually separated from service.

The First Medical Board met on 29 April 1992. The Commissioner-General, by Circular of 5 January 1992, offered a more favourable exchange rate to certain Syrian employees of UNRWA who took voluntary retirement up to the end of February 1992. The provisions of this Circular do not apply to the Applicant because he did not leave the Organization until 1994. Even if the First Medical Board had declared him unfit, its finding would have come too late to have brought the Applicant within the terms of the Commissioner-General's Circular.

VI. For the foregoing reasons, the Tribunal rejects the Applicant's pleas, including the Applicant's request for costs.

(Signatures)

Samar SEN
President

Hubert THIERRY
Vice-President

Francis SPAIN
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary